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Supreme Court, U.S.
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No. 98-1886

IN THE

Supreme Court of the United States

MAYOR AND CITY COUNCIL
OF BALTIMORE, MARYLAND,

Petitioner,

v.

ONE 1995 CORVETTE VIN #1G1YY220585103433,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

RESPONDENT'S BRIEF IN OPPOSITION

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1 pp

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Misstatement of Fact and Law	1
The Facts — The Rest of the Story	1
Maryland's Statute	2
Reasons for Denying the Writ	3
Conclusion	7

TABLE OF CITED AUTHORITIES

Page

Cases:

Boyd v. United States, 116 U.S. 616 (1886) 3

Brown v. Ohio, 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 23 (1977) 2

Maryland v. Dyson, __ U.S. __, No. 98-1062, decided June 21, 1999 1

O'Brien v. Skinner, 414 U.S. 524, 94 S. Ct. 740, 38 L. Ed. 29 702 (1974) 2

One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965) 3, 4, 7

State of Utah v. C.R., 1999 Utah Adv. Rep. 32, 1999 Utah LEXIS 72 ..... 3, 4

United States v. Janis, 428 U.S. 433 (1976) 4

United States v. Ursery, 518 U.S. 267 (1966) 4

Wainwright v. Goode, 464 U.S. 78, 104 S. Ct. 378, 78 L. Ed. 2d 187 (1983) 2

Cited Authorities

	Page
Statutes:	
Md. Ann. Code, Article 27, § 297	2
Md. Ann. Code, Article 27, § 297(i)(1)(iii)2	2
Md. Ann. Code, Article 27, § 297(i)(1)(iii)3	2
Md. Ann. Code, Article 27, § 297(i)(3)	3
Md. Ann. Code, Article 27, § 297(k)(3)(vii)	3
United States Constitution:	
Fourth Amendment	6
Rule:	
United States Supreme Court Rule 15.2	1
Other Authority:	
Wayne R. LaFave, Search and Seizure, A Treatise on the Fourth Amendment, Third Edition, 1998 Pocket Part, § 1.7	5

MISSTATEMENT OF FACT AND LAW

Rule 15.2 demands that the brief in opposition address any perceived misstatements of fact or law in the petition. The petition in this case: (1) incompletely states the facts in this case; and (2) mischaracterizes the nature of the Maryland forfeiture statute. The latter causes the petitioner's question presented to be flawed.

THE FACTS — THE REST OF THE STORY

The Petition for Writ of Certiorari fails to mention some facts which were demonstrated below. First, the criminal charges against Wendell Holmes, the owner of the vehicle in issue, were dropped. According to the written findings of fact and conclusions of law by the nisi prius judge (see 185a, n.1, Appendix to Pet. for Cert.), "The Baltimore City State's Attorney's office declined to prosecute [Holmes] dismissing the [criminal] case at the District Court level after consultation between the District Court prosecutor prior to preliminary hearing and an Assistant State's Attorney in the Specialized Narcotics Unit." Second, the nisi prius judge articulated clearly his findings and conclusions that there was not probable cause to search and seize Holmes' vehicle. (182a to 190a, Appendix to Pet. for Cert.) Unlike *Maryland v. Dyson*, __ U.S. __, No. 98-1062, decided June 21, 1999, there was no state court finding of probable cause. Indeed, on the contrary, the trial court below found no probable cause for the stop and search of the vehicle. The Maryland Court of Special Appeals, where Appellee had no counsel, never questioned that finding. At Maryland's highest court, the Court of Appeals of Maryland, Petitioner here never addressed the issue of probable cause. In light of the prosecutorial decision not to try Holmes or

contest the determination of lack of probable cause, the rhetoric set forth as a "Statement of Facts" in the Petition is curious at least, and irrelevant at worst.

MARYLAND'S STATUTE

The Petition mischaracterizes the nature of the Maryland forfeiture statute. Petitioner wants it to be a pure civil in rem forfeiture statute. It is not. The Court of Appeals of Maryland carefully considered the nature of Md. Ann. Code, Article 27, Section 297 and declared it, below, to be "quasi-criminal," 343 Md. at 132-7 (23a-29a, App. to Pet. for Cert.) "The views of the State's highest court with respect to state law are binding on the federal courts." *Wainwright v. Goode*, 464 U.S. 78, 84, 104 S. Ct. 378, 382, 78 L. Ed. 2d 187 (1983); *Brown v. Ohio*, 432 U.S. 161, 167, 97 S. Ct. 2221, 2226, 53 L. Ed. 23, 187 (1977). It is, of course, of no moment that Maryland's intermediate appellate court referred to the statute as civil in rem. When a state's intermediate appellate court has one interpretation of a state law, but the highest court of the state concludes otherwise, this Court follows the construction given by the highest court of a state. *O'Brien v. Skinner*, 414 U.S. 524, 531, 94 S. Ct. 740, 744, 38 L. Ed. 29 702 (1974).

By terming the forfeiture statute quasi-criminal, the Court of Appeals of Maryland adhered to the legislative construction of Maryland's forfeiture law. The loci for these provisions is Maryland's Criminal Law Article. The standards for forfeiture are explicitly tied to criminal acts or to the "criminal record of the violator," § 297(i)(1)(iii)2, a "previous conviction," § 297(i)(1)(iii)3, or other criminal activity. Furthermore, the forfeiture of a motor vehicle may only proceed after the chief law enforcement officer of a

political subdivision attests that "the forfeiture is warranted." § 297(i)(3). And, if a forfeited vehicle is sold, the law enforcement agencies of the jurisdictions involved in the seizure, may "apply to the Governor's Office of Crime Control and Prevention" to ameliorate any squabble over the proceeds. § 297(k)(3)(vii).

For the foregoing reasons, particularly the characterization of the applicable forfeiture law by the highest state court as quasi-criminal, Petitioner's question presented is irreparably flawed.

REASONS FOR DENYING THE WRIT

There are clear reasons for denying the writ. First, as has been shown, *supra*, pp. 2-3, the putative question presented is fatally flawed; the alleged "civil in rem" characterization of the relevant Maryland statute is incorrect. The forfeiture proceedings at issue were "quasi criminal."

Second, Petitioner's claim that *Plymouth Sedan's*, principal lodestar, i.e. *Boyd*, has been relevantly repudiated is inaccurate. The Court of Appeals of Maryland, below, addressed Petitioner's claim that *Boyd* has been completely repudiated, and concluded that, while several of *Boyd's* declarations have withered:

> *Boyd's* discussion of forfeiture actions themselves, and their "quasi-criminal" nature, appears to remain intact. We know of no other court which, prior to the Court of Special Appeals decision in the instant case, had challenged *Plymouth Sedan* based upon its reliance on *Boyd*.

353 Md. at 120, n.3. (7a of App. to Pet. for Cert.). Petitioner has not refuted this observation. *Compare State of Utah v.*

C.R., 1999 Utah Adv. Rep. 32, 1999 Utah LEXIS 72, *16 (filed 4/30/99), where the Supreme Court of Utah, relying on *Plymouth Sedan* and its conceptualization of it, wrote:

> In those cases where the penalty is "quasi-criminal" in nature, the exclusionary rule may apply.

Third, *United States v. Ursery*, 518 U.S. 267 (1966) and *United States v. Janis*, 428 U.S. 433 (1976), contrary to Petitioner's assertions, do not forecast the demise of *Plymouth Sedan*. Petitioner relies heavily on rulings by this Court. Perhaps, with prescience, the Court of Appeals of Maryland noted Petitioner's reliance on these holdings and asserted, 353 Md. at 121 (10a-11a, App. to Pet. for Cert.), why these decisions were inapposite: the majority opinion in *Ursery* never "discussed or cited" *Plymouth Sedan* and *Janis* contains a footnote reference to *Plymouth Sedan* implying its continued vitality. The reference in *Janis*, 428 U.S. 433, 447 n.17 (1976), to *Plymouth Sedan* is positive and indicative of vitality in the "quasi-criminal" context as here presented.

Fourth, the Petitioner's entire submission regarding the purposes of the exclusionary rule and its application to forfeiture proceedings is appropriately undercut by Professor Wayne R. LaFave's analysis and rebuke of the Court of Special Appeals decision and his accurate comments on the deterrent function of *Plymouth Sedan*. LaFave wrote, in pertinent part:

> From the standpoint of the Fourth Amendment exclusionary rule's deterrent function, the result in *1995 Corvette* [at the Court of Special

> Appeals] is troubling at best. The critical point is that "the exclusionary rule, focused upon general, not specific, deterrence, depends not upon threatening a sanction for lack of compliance but upon removing an inducement to violate Fourth Amendment rights." [Footnote omitted.] It is to be doubted that the impact of *1995 Corvette* will be lost on the police: it is a $35,000 inducement to violate the Fourth Amendment! And this very substantial penalty on drug dealers discovered by violating the Constitution is no less an inducement merely because very substantial penalties would also exist if the police, by greater efforts, were able lawfully to prove guilt at a criminal trial. Moreover, that $35,000 [i.e. the value of the Corvette] inducement is enhanced, not reduced, by the fact that such a penalty can be imposed without complying with the procedures corresponding to those necessary in a criminal prosecution. It is to be hoped, therefore, that *Plymouth Sedan* will continue to be applied to a broader range of forfeiture proceedings.

Wayne R. LaFave, Search and Seizure, A Treatise on the Fourth Amendment, Third Edition, 1998 Pocket Part, § 1.7, p. 30. LaFave is an author whose works are often cited by this Court. His remarks quoted above, used an economy of words but produced a surfeit of sound analysis. Concerned by the intermediate appellate ruling, LaFave could well be impressed with the Court of Appeals of Maryland analysis and decision, preserving the deterrent effect on unreasonable searches and seizures.

The issue of deterrence was addressed appropriately by the Court of Appeals of Maryland, below. It declined to shelve the Fourth Amendment and its Exclusionary Rule in (353 Md. at 137-8, 29a-31a, App. to Pet. for Cert.)

> a civil action that authorizes the taking of private property, but only if that property is used , for criminally-related purposes. To do otherwise might facilitate a practice in which a car or other property, and the financial benefits resulting from forfeiture, might become the primary purpose of the actions rather than the apprehension and conviction of the criminals and their removal from society. *See* William Patrick Nelson, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 Cal. L. Rev. 1309, 1325-33 (arguing that pragmatic concerns, *i.e.* increased budgetary revenue, the ability to use valuable assets in future undercover operations, and an appearance of stronger job performance, have encouraged greater use of forfeiture laws.)
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> * * *
>
> The lack of the deterrent effect of the exclusionary rule under circumstances in which probable cause is lacking could lead to a separate line of police work devoted to forfeiture. We are keenly aware that governments increasingly have filed civil forfeiture actions in lieu of criminal charges, knowing that constitutional protections provide greater obstacles to their criminal cases,

> and that forfeitures have a great financial impact not only on the defendant but on the government's coffers as well. *See*, Nelson, *supra*, at 1328 (noting one study in which eighty percent of property owners who lost their assets to forfeiture were never charged with a criminal offense).

As a practical matter, in the real world, forfeiture has emerged as a tool to fund law enforcement and the incentive to forfeit needs deterrence, as the Court of Appeals of Maryland has conceptualized. The need for the exclusionary rule is as appropriate in this context as in purely criminal proceedings. *Plymouth Sedan* is not flawed and should not be revisited or disturbed.

CONCLUSION

For the reasons given, the petition should be denied.

Respectfully submitted,

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